



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Costs – *Calderbank* letter - Fire caused on property by contact between trees and electrical equipment – Held: no basis for award of indemnity costs – Not unreasonable not to have accepted offer – See *Bonny Glen Pty Limited v Country Energy (No. 2)* (I)

Civil Procedure (NSW) - Exercise of discretion to extend time for service of writ – Limitation period for cause of action had expired – Deliberate delay in service - Declaration that no valid service has been effected – See *Arthur Andersen Corporate Finance Pty Limited v Buzzle Operations Pty Limited (in liquidation)* (I, B, C)

Commercial Arbitration Act 1984 (NSW) – Reinsurance - Award of arbitrator set aside – See *Westport Insurance Corporation Limited v Gordian Runoff Limited* (I)

Motor vehicle accidents (NSW) – Severe injuries – Contributory negligence – Application to transfer to District Court – Held: application granted – See *Murray v Ellinghaus* (I)

Mortgagee sale - Duty to see property sold at market value – Appeal dismissed – Held: no breach of mortgagee's duty by sale in one line instead of individually – See *Investec Bank (Australia) Limited v Glodale Pty Limited* (I, B, C)

Costs - Barrister had caused mistrial in personal injury case - Costs of appeal awarded on a party/party basis - Each party to bear own costs of first trial - See *Rees v Bailey Aluminium Products Pty Limited (No. 2)* (I)

Civil Procedure (Qld) - Application to amend fifth statement of claim - Limitation of actions - Negligence advice – Refused leave to amend - See *Zonebar Pty Limited v Global Management Corporation Pty Limited* (I, C)

Security for costs - Breakdown of car dealership agreement - Exercise of discretion – Held: application declined - See *Day v Mercedes-Benz Australia Pacific Pty Limited* (B)



Veterans' entitlements - Calculation of invalidity service pension – Superannuation – Statutory interpretation – Appeals dismissed – See *Sleep v Repatriation Commission* (B)

Trustee Act 1925 (NSW) – Application for appointment of receiver to property of trustee – Equitable remedies - Self-incrimination and entitlement to objection to making affidavit of discovery – See *Crossman v PILT Nominees Limited* (B)

FROM CANADA:

Insurance – Denial of indemnity – Alleged arson – Fine art collection – Trial judge rejected all of the insurer's arguments – Appeal allowed but new trial on proof of loss – See *Sagl v Chubb Insurance Company of Canada* (I)



Summaries with links (5 minute read)

Friday 15 May 2009

Day v Mercedes-Benz Australia Pacific Pty Ltd [2009] FCA 464

Federal Court of Australia

Stone J (in Sydney)

Security for costs - s1335 *Corporations Act* 2001 (Cth) – s56 *Federal Court of Australia Act* 1976 (Cth) - respondents seeking that third applicant, a company in liquidation, provide security for first & second respondents' costs – dispute relating to breakdown of car dealer agreement between third applicant & first respondent – statement of claim raising allegations of unconscionable conduct, misleading or deceptive conduct, misrepresentations as to taxation liability & breach of a bailment agreement – cross-claim filed by respondents – case law considered – exercise of discretion – application for security for costs declined.

[Day](#) (B)

Sleep v Repatriation Commission [2009] FCA 472

Federal Court of Australia

Besanko J (in Adelaide)

Veterans' Entitlements Act 1986 (Cth) - calculation of veteran's invalidity service pension – Rate Calculator - appeal from two decisions of Administrative Appeals Tribunal – superannuation products - challenge to decision of Tribunal affirming respondent's decision to apply an assets test to applicant's invalidity service pension, his wife's partner service pension, and to include in the applicant's assets a property situated at Port Road, Croydon ascribing to it a value of \$140 – both appeals dismissed.

[Sleep](#) (B)

Bonny Glen Pty Ltd v Country Energy (No 2) [2009] NSWCA 106

Court of Appeal of New South Wales

Costs – indemnity costs - for Court of Appeal decision 24 February 2009, see 'Benchmark' I & IBC Thursday 26 February 2009 & link below - Calderbank offers by plaintiff – whether unreasonable for defendant not to have accepted them – answer 'no.'

[Bonny Glen](#) (I)

[Bonny Glen](#) – decision 24 February 2009 - negligence – economic loss – foreseeability - calculation of damages – for decision appealed from see link below - primary judge found that the Country Energy owed a duty of care to Bonny Glen, had breached that duty of care & was liable for damages in respect of property damage but not in respect of economic loss – in case this latter finding was incorrect, primary judge had determined the quantum of loss that would have been awarded at \$753,396.72 – Bonny Glen appealing against primary judge's finding of non-liability for economic loss & against primary judge's failing to allow for interest - whether loss caused by voluntary actions taken by Bonny Glen in response to a situation created by Country Energy's negligence recoverable - respondent cross-appealing on quantum - appeal & cross-

appeal allowed.

[Bonny Glen](#) – decision 31 August 2007

Arthur Andersen Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd (in liq) [2009] NSWCA 104

Court of Appeal of New South Wales

Ipp, Tobias & McColl JJA

Uniform Civil Procedure Rules 2005 r1.12 - exercise of discretion to extend time for service of writ - where limitation period for underlying action had expired - where deliberate delay in service – policy behind limitation statute - litigation funding - objects of case management - avoidance of delay – appeal upheld – s56(3) *Civil Procedure Act* 2005 (NSW) - declaration that none of defendants to Buzzle's action against Arthur Andersen had been served, validly, with statement of claim or amended statement of claim – detailed analysis of legislation & case law in judgment of Ipp JA.

[Arthur Andersen Corporate Finance](#) (I, B, C)

Westport Insurance Corporation & Ors v Gordian Runoff Limited [2009] NSWSC 245

Supreme Court of New South Wales

Einstein J

Commercial Arbitration Act 1984 (NSW) - reinsurance treaties - plaintiffs' application for leave to appeal on questions of law arising out of award - dispute concerning scope & operation of some reinsurance contracts issued by plaintiffs & entitlement of defendant as reinsured to recovery from plaintiffs in respect of claims made on defendant by its original insured, FAI Insurances Ltd - at arbitration, defendant was claimant & plaintiffs the respondents – at arbitration, plaintiffs had succeeded on all issues save for question of law concerning s18B(1) *Insurance Act* 1902 (NSW) & s22(2) *Commercial Arbitration Act* 1984 (NSW) - 'amiable composition & equity' clauses – ascertaining the relevant class of business – consideration of QBE Insurance (International) Ltd v Commercial Union Insurance of Australia Ltd (1988) 5 ANZ Ins Cas 60-839 - His Honour Court upheld plaintiffs' submissions as to primary construction of s18B – award set aside – extensive review of text & case law from UK, USA & Australia.

[Westport Insurance Corporation](#) (I)

Murray v Ellinghaus [2009] NSWSC 391

Supreme Court of New South Wales

Adams J

Personal injuries - motor traffic accident – severe injuries - whether matter should be transferred to District Court - defence of contributory negligence - damages - matter transferred.

[Murray](#) (I)

**Crossman v PILT Nominees [2009] NSWSC 393**

Supreme Court of New South Wales

White J

Trustee Act 1925 (NSW) – plaintiff within class B general beneficiaries seeking various orders – application for appointment of receiver to property of trustee – assets consisting of a number of service stations leased to Shell - equitable remedies – injunctions – freezing orders- undertakings providing same protection - entitlement to objection to making affidavit of discovery on ground of privilege against self-incrimination or self-exposure to a penalty.

[Crossman](#) (B)**Investec Bank (Australia) Limited v Glodale Pty Ltd & Ors [2009] VSCA 97 (14)**

Court of Appeal of Victoria

Neave & Redlich JJA; Forrest AJA

Mortgagee sale - duty to take reasonable care to ensure property sold at market value - sale of holiday apartment complexes in Port Douglas by Bank as mortgagee in possession - primary judge had found against the Bank – whether Bank had breached its duty under s85 *Property Law Act* 1992 (Qld) ‘to take reasonable care to ensure that the property is sold at market value’ & under s420A *Corporations Act* 2001 (Cth) to ‘take all reasonable care to sell the properties for not less than their market value’ – whether primary judge had erred in his findings regarding ‘market value’ of properties – all parties challenging findings as to valuation – appeal & cross-appeal on valuation issue dismissed - appointment of non-local real estate agent constituted breach of duty – sale in one line instead of individually not breach of mortgagee’s duty – appeal dismissed – Bank’s entitlement to interest - question of quantum of counterclaim to be remitted to trial judge.

[Investec Bank](#) (I, B, C)**Rees v Bailey Aluminium Products Pty Ltd & Anor (No 2) [2009] VSCA 96**

Court of Appeal of Victoria

Ashley & Redlich JJA; Coghlan AJA

Costs – personal injuries - for Court of Appeal decision 5 December 2008, see ‘Benchmark’ I & IBC Wednesday 10 December 2008 – first respondent to pay 75% of appellant’s costs of appeal on party/party basis - as to costs of first trial, unique circumstances - each party to bear its own costs of the first trial.

[Rees](#) (I)

[Rees](#) - decision 5 December 2008 - legal practitioners – duties of Counsel – defendant’s Counsel in civil jury trial for damages for personal injuries – unjustified allegation of fraudulent collusion between plaintiff & third party – improper cross-examination – breach of rule in *Browne v Dunn* (1893) 6R 67 – failure to follow the procedure in *R v Orton* [1922] VLR 469 - introduction of extraneous matters in closing address – no application for discharge of jury – case law considered - whether judgment for defendant should be set aside – assessment of prejudicial effect of counsel’s misconduct upon jury – appeal allowed.

Zonebar Pty Ltd v Global Management Corporation Pty Ltd & Anor [2009] QCA 121

Court of Appeal of Queensland

White & Wilson JJ; Keane JA

Amendment of pleadings – Uniform Civil Procedure Rules r.376(4)(b) - limitation of actions - primary judge had refused leave to amend fifth amended statement of claim – applicant owner/developer of land at Springwood – first respondent had been engaged to provide project management – second respondent first respondent’s director – applicant alleging failure to exercise due care & diligence in advising as to development approvals – trade practices – whether any new cause of action applicant seeking to litigate arose out of same or substantially same facts as cause of action for which relief already claimed – application for extension of time refused – notice of appeal struck out – ‘cause of action’ - case law considered.

[Zonebar](#) (I, C)**From Canada...****Sagl (resp.) v Chubb Insurance Company of Canada (app), 2009 ONCA 388**

Court of Appeal of Ontario

Lang, Juriansz & Epstein JJA

Insurance policy – binder - allegation of arson – credibility - respondent’s home destroyed by fire – fine arts collection & jewellery - she claimed against appellant, her insurer, among others, for losses sustained - insurer defended claim alleging arson in which respondent had participated & that she had intentionally made material misrepresentations to Chubb, both in her initial application for coverage & in presenting her claim under the policy – primary judge had rejected all three of insurer’s defences & awarded respondent damages in the amount of \$4,534,354.47 plus \$500,000 in punitive damages, as well as substantial indemnity costs - insurer had also been ordered to pay costs of defendant insurance brokers on partial indemnity basis – appeal allowed but new trial to be restricted solely to issue of respondent’s proof of loss, specifically her ability prove her loss in relation to fine arts collection, & whether policy void due to intentional misrepresentation in proof of loss.

[Sagl](#) (I)

corrigendum: here is the link for the New Jersey decision of [Wakefern Food Corporation . vs. Liberty Mutual Fire Insurance Company](#) [supermarket insurance claim following power blackout] which was included in ‘Benchmark’ I & IBC Friday 8 May 2009.

[Wakefern Food Corporation](#) (I)**Key: (I) Insurance, (B) Banking, (C) Construction**